

NOT TO BE PUBLISHED

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

PATRICK LORAN REECE,

Defendant and Appellant.

E028656

(Super.Ct.No. RIF088211)

OPINION

APPEAL from the Superior Court of Riverside County. Timothy J. Heaslet, Judge.

Affirmed as modified.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Lora Fox Martin and Frederick B. Clark, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant guilty of two counts of making terrorist threats (Pen. Code, § 422¹) and two counts of assault, a lesser included offense of assault with a firearm (§ 245, subd. (a)(2)). The trial court then found true that defendant had two prior prison convictions (§ 667.5, subd. (b)) and one prior strike conviction (§§ 667, subds. (c) & (e), 1170.12, subd. (c)). As a result, defendant was sentenced to a total term of seven years four months in state prison. On appeal, defendant contends (1) the trial court prejudicially erred by failing to sua sponte instruct the jury on the meaning of “sustained fear”; (2) there was insufficient evidence to support the assault convictions; and (3) the trial court violated section 654 by imposing concurrent sentences on the assault convictions. We agree with defendant that one of his assault convictions (count 4) should be stayed; however, we reject defendant’s remaining contentions and affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

On October 5, 1999, Brian Curd was walking down a street near his apartment complex when defendant approached him from behind, riding a bicycle. Defendant was yelling at Curd, saying he was going to kill him, rape his wife, and kill his three-month-old son. When defendant got closer to him, Curd could see that defendant had a handgun pointed at him. Curd recognized defendant as the person with whom he had a physical altercation the night before over an incident involving Tabitha Campbell, Curd’s live-in

¹ All future statutory references are to the Penal Code unless otherwise stated.

girlfriend. Curd became frightened, ran behind a house, and picked up a “two-by-four” to defend himself if defendant followed him.

After about five minutes, when defendant stopped screaming that he was going to kill Curd and his son and rape his “wife,” Curd started walking home. As he got near his apartment, Curd saw defendant ride away from his residence. Curd became afraid that defendant had done something to Campbell and his son and ran the remainder of the distance to his residence.

Campbell was inside her apartment, feeding her baby, looking out the screen of the front door, which was open, when defendant approached. Defendant started to open the screen door, but closed it when he saw Campbell sitting inside the residence. Defendant then pushed his handgun into the screen, pointed it at Campbell and the baby, and said, “I’m going to kill your fucking boyfriend and that nigger that was here last night.” Defendant also stated, “Who do you think it’s [*sic*] been writing ‘NLR’ on your car[?]” Campbell confirmed that somebody had been writing “NLR” on the dust accumulated on the window of her car. He told her that he was in a gang, pointed at his tattoos, and asked her what she thought the tattoos were for. Campbell did not say anything back to defendant because she was scared he was going to shoot Curd. Defendant then rode off on his bicycle, and Campbell called the police.

Defendant was arrested a short time later by a Moreno Valley police officer. After he was positively identified by Campbell and Curd, defendant was overheard by an officer stating, “Wait until I get out of jail tonight” to Campbell. The officers searched the surrounding area for a gun, but none was found. Defendant told a police officer that if he

had been asked “nicely” he would have told the officer where the “gun was at.” Campbell stated that she heard the word “bitch” spoken by defendant when he was being taken away in the police car. Campbell testified that she remained frightened of defendant even after he was arrested because she worried about retaliation from his gang. Curd also continued to be in fear for his life, and he remained afraid that defendant would kill him through the time of trial.

Defendant testified that he had been attacked by Curd and Curd’s friends the night before the incident. The next morning, he saw Curd and yelled, “Hey.” Curd ran, and then defendant saw him approaching with a four- or five-foot-long “two-by-four.” Defendant pulled out a toy gun, which he carried because he was afraid of being attacked, but never actually pointed it at Curd. Curd stopped when he saw the toy gun. Shortly thereafter, defendant saw Campbell with her baby outside of her apartment. She told him to leave Curd alone. Defendant asked her, “What was last night all about? Why did he do that?” Campbell did not reply, and defendant went to his mother’s apartment. Defendant denied threatening Campbell.

Defendant’s mother testified that she obtained a toy gun from defendant’s apartment and gave it to an investigator about one week before the trial.

In an information filed on November 3, 1999, by the Riverside County District Attorney’s office, defendant was charged with two counts of making terrorist threats (§ 422) (counts 1 and 2); one count of being an ex-felon in possession of a firearm (§ 12021, subd. (a)(1)) (count 3); and two counts with assault with a firearm (§ 245, subd. (a)(2)) (counts 4 and 5). The information further alleged that defendant personally used a handgun

in the commission of all of the counts (§§ 12022.5, subd. (a), 1192.7, subd. (c)(8)); that defendant had suffered two prior prison term convictions (§ 667.5, subd. (b)); and that defendant had one prior strike conviction (§ 667, subds. (c) & (e), 1170.12, subd (c)).

On August 23, 2000, a jury found defendant guilty of counts 1 and 2; guilty of the lesser included offense of assault in counts 4 and 5; and not guilty of count 3. The jury also found all of the firearm use allegations to be not true. After defendant waived his right to a jury trial on the prior conviction allegations, the trial court found them to be true.

On December 14, 2000, defendant was sentenced to a term of four years on count 1; a consecutive term of one year four months on count 2; a consecutive one-year enhancement for each of the two prior prison convictions; and concurrent terms of 180 days on counts 4 and 5.² Defendant then filed his notice of appeal.

² The reporter's transcript and abstract of judgment do not indicate the sentence on counts 4 and 5. However, it appears from the December 14, 2000, minute order that the court sentenced defendant to 180 days on each of those counts. It is also implicit from the record that the sentences on counts 4 and 5 were to be served concurrent to those on counts 1 and 2.

II DISCUSSION

A. *Instructional Error*

Defendant first contends the trial court committed prejudicial error in failing to sua sponte instruct the jury on the meaning of “sustained fear.” The People reply that defendant waived this argument by not requesting an amplifying instruction on the matter and, in the alternative, argue that defendant’s contention is without merit because a further instruction was unnecessary and would not have impacted the verdict.

A trial court has the duty to instruct the jury on matters closely and openly connected with the facts in evidence and necessary to the jury’s understanding of the case. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) If a party believes proposed jury instructions are incomplete or need amplification, it is his or her obligation to request additional or clarifying instructions. Failure to do so waives any complaint on appeal. (*People v. Bonin* (1989) 47 Cal.3d 808, 856; *People v. Anderson* (1966) 64 Cal.2d 633, 639; *People v. Dennis* (1998) 17 Cal.4th 468, 514; *People v. Daya* (1994) 29 Cal.App.4th 697, 714.) Absent a request for amplification, the general rule in defining a criminal offense is that “[i]f the jury would have no difficulty in understanding the statute without guidance, the court need do no more than instruct in statutory language.” (*People v. Estrada* (1995) 11 Cal.4th 568, 574.) A trial court also has no sua sponte duty to give amplifying or clarifying instructions where the terms used in the instructions given are commonly understood by those familiar with the English language. (*People v. Ryan* (1999) 76 Cal.App.4th 1304, 1318-1319; *People v. Richie* (1994) 28 Cal.App.4th 1347, 1360.)

Here, the trial court instructed the jury with CALJIC No. 9.94 on the elements of making a terrorist threat in violation of section 422. Defendant requested no other instructions below, and therefore his claim is not cognizable here. Even were it not so, however, defendant's claim would fail. As the People note, the meaning of "sustained fear" is readily apparent in ordinary speech. The phrase is not a technical or legal term of art. The issue of sustained fear was well covered in closing argument by the prosecutor, who informed the jury that "sustained fear" is more than a "passing fear" or a "momentary fear." As recognized in *People v. Allen* (1995) 33 Cal.App.4th 1149, "sustained fear" means fear that is beyond momentary, fleeting, or transitory. (*Id.*, at p. 1156.) The prosecutor argued that Curd was frightened for his life after defendant pointed the gun at him; that Campbell feared for Curd's life; that they called the police because they were afraid of defendant; that Campbell is still frightened of defendant because of defendant's reference to his gang affiliations; and that Curd was frightened of defendant until defendant was actually apprehended by the police. As part of their testimony, Curd and Campbell also explained their sustained fear of defendant after he threatened them. In sum, the standard instructions adequately informed the jurors as to the elements that had to be proven to convict defendant of making terrorist threats against Curd and Campbell. The jury also had sufficient other evidence from which to determine that Curd and Campbell were in sustained fear of defendant. The court had no duty to give additional definitions.³

³ Even if the trial court erred in failing to instruct the jury on the meaning of "sustained fear," in view of the record it is not reasonably probable defendant would have
[footnote continued on next page]

B. *Insufficiency of the Evidence*

Defendant next claims there was insufficient evidence to support the assault convictions because he did not attempt to commit an act of violence against the victims and because he used a toy gun. We disagree.

“In assessing a claim of insufficiency of evidence, the reviewing court’s task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — that is, evidence that is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11, citing *People v. Johnson* (1980) 26 Cal.3d 557, 578.) The reviewing court may not substitute its assessment of the evidence for that of the jury or engage in appellate fact-finding. (*Rodriguez, supra*, at pp. 12-14; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 319, 326.) The standard of review applies even “when the conviction rests primarily on circumstantial evidence.” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

Given this court’s limited role on appeal, defendant bears an enormous burden in claiming there was insufficient evidence to sustain his convictions for assaults. It is the exclusive function of the trier of fact to assess the credibility of witnesses and draw reasonable inferences from the evidence. (*People v. Barnes* (1986) 42 Cal.3d 284, 303;

[footnote continued from previous page]

obtained a better result had the court given the instruction. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The elements of making terrorist threats on Curd and Campbell were amply satisfied.

see also *People v. Hale* (1999) 75 Cal.App.4th 94, 105.) Here, the record discloses ample evidence to support the jury's verdict.

An assault is “an unlawful attempt, coupled with the present ability, to commit a violent injury on the person of another, or in other words, it is an attempt to commit a battery.” (*People v. Colantuono* (1994) 7 Cal.4th 206, 214.) However, the fact the defendant must “attempt” a battery does not mean he must actually strike at his victim. All that is necessary is that the circumstances show a readiness to do violence absent escape or retreat by the victim. As our Supreme Court stated in *People v. Yslas* (1865) 27 Cal. 630, “[i]t is not indispensable to the commission of an assault that the assailant should be at any time within striking distance. If he is advancing with intent to strike his adversary and comes sufficiently near to induce a man of ordinary firmness to believe, in view of all the circumstances, that he will instantly receive a blow unless he strike in self defense or retreat, the assault is complete. . . . In the present case the defendant was guilty of an assault if he advanced on the prosecutrix in such a manner as to threaten immediate violence, notwithstanding she succeeded in making her escape without injury.” (*Id.*, at p. 634.)

Hence, pointing a weapon at another person is enough to constitute an assault if the circumstances support the inference that the defendant was prepared to use the weapon, even if he did not actually use it. Numerous other decisions have held the pointing of a weapon constitutes an assault where the act was done to induce compliance with a command or threat. (See, e.g., *People v. Fain* (1983) 34 Cal.3d 350, 357 [defendant pointed gun at victim and ordered him to put money on table and enter restroom]; *People v. McCoy* (1944)

25 Cal.2d 177, 190 [defendant pointed knife at victim and said, ““Don’t make any noise or I’ll use this knife””]; *People v. Lipscomb* (1993) 17 Cal.App.4th 564, 570 [defendant pointed gun at victim and ordered him into house]; *People v. Daniels* (1993) 18 Cal.App.4th 1046, 1051 [defendant pointed gun at occupants of living room and said, ““Break, motherfuckers, break.””]; *People v. Vorbach* (1984) 151 Cal.App.3d 425, 428 [defendant held knife in threatening manner and demanded money; no requirement that defendant attempt to use knife].)

In the present matter, defendant approached Curd from behind and, while pointing a gun at him, threatened his life and his son’s life. He also threatened to rape his girlfriend. Curd recognized the gun as a real firearm based on his experience with guns. Curd became frightened, ran behind a house, and picked up a “two-by-four” to defend himself if defendant followed him. Shortly thereafter, defendant went to Curd’s and Campbell’s residence, pushed his handgun into the screen, pointed it at Campbell and her baby, and said, “I’m going to kill your fucking boyfriend and that nigger that was here last night.” Defendant also made it clear that he was in a gang as he pointed the gun at her. Later, after defendant was apprehended, he told Campbell, “Wait until I get out of jail tonight.” Defendant’s conduct here patently amounted to assault.

Defendant, however, maintains that, since the jury acquitted him on the firearm use allegation and the assault with a deadly weapon charges, the jury impliedly accepted the defense evidence that he used a toy gun. Therefore, he claims that, since he used a toy gun, he did not have the present ability to commit an assault. Defendant’s view of the law simply is wrong. As the People point out, the jury’s decision on one charge is irrelevant to

evaluating its decision on another for purposes of a sufficiency of evidence analysis. (See, e.g., *People v. Palmer* (2001) 24 Cal.4th 856, 860-866.) Moreover, defendant requested instruction on the lesser included offense of assault and cannot now complain.

Present ability is demonstrated when a defendant has equipped himself with the means for an assault and maneuvered himself into a position to carry it out. (*People v. Valdez* (1985) 175 Cal.App.3d 103, 112.) When the threat consists only of words, the target of the threat can determine from the circumstances whether the defendant is presently able to carry out the threatened conduct. When the threat is not made with words but rather with a gun, the target of that conduct cannot know whether the gun is loaded or otherwise capable of being fired. Simply put, while defendant may have known he was not able to carry out the threats because his gun was a toy, the victims did not know that. Defendant's knowledge on that point simply is irrelevant. Furthermore, Curd testified that he was familiar with guns and that defendant's handgun was real.

Moreover, a reasonable trier of fact could conclude, based on the circumstances of this case, that defendant had the present ability to hit or injure the victims with the gun, whether real or fake. As the Supreme Court stated in another early decision: "Holding up a fist in a menacing manner, drawing a sword, or bayonet, presenting a gun at a person who is within its range, have been held to constitute an assault. So, any other similar act, accompanied by such circumstances as denote an intention existing at the time, coupled with a present ability of using actual violence against the person of another, will be considered an assault." (*People v. McMakin* (1857) 8 Cal. 547, 548; see also *People v. Bradford* (1976) 17 Cal.3d 8, 20 ["merely pointing the loaded revolver at the officer would

have constituted the offense” of assault]; *People v. Tran* (1996) 47 Cal.App.4th 253, 261-262 [sufficient evidence that defendant assaulted man and his baby when defendant chased both with a knife in his hand].) Assault does not require actual physical contact with the victim(s). (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.)

Viewing the evidence as we must in a light most favorable to the People in support of the verdict, we believe any rational trier of fact could have found defendant guilty of assault on Curd and Campbell under these facts.

C. *Section 654*

Defendant lastly contends the concurrent sentences for counts 4 (assault on Curd) and 5 (assault on Campbell) violate section 654 and should have been stayed because the assaults were part of an indivisible course of conduct with a single objective to the terrorist threat counts (counts 1 and 2). We find that count 4 should be stayed, but reject defendant’s remaining claim of error.

“Section 654 provides that even though an act violates more than one statute and thus constitutes more than one crime, a defendant may not be punished multiple times for that single act. [Citations.] The “act” which invokes section 654 may be a continuous “course of conduct’ . . . comprising an indivisible transaction . . .” [Citation.]” (*People v. Centers* (1999) 73 Cal.App.4th 84, 98, quoting *People v. Akins* (1997) 56 Cal.App.4th 331, 338-339, quoting *People v. Liu* (1996) 46 Cal.App.4th 1119, 1135; see also *People v. Perez* (1979) 23 Cal.3d 545, 551; *People v. Harrison* (1989) 48 Cal.3d 321, 335.)

The divisibility of a course of conduct depends upon the intent and objective of the defendant. If all the offenses are incidental to one objective, the defendant may be punished

for any one of them, but not for more than one. On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. (*People v. Centers, supra*, 73 Cal.App.4th at p. 98; *In re Adams* (1975) 14 Cal.3d 629, 634.)

The principal inquiry in each case is whether the defendant's criminal intent and objective were single or multiple. Each case must be determined on its own facts. (*People v. Perez, supra*, 23 Cal.3d 545, 551; *People v. Beamon* (1973) 8 Cal.3d 625, 630-639.) The question whether the defendant entertained multiple criminal objectives is one of fact for the trial court, and its findings on this question will be upheld on appeal if there is any substantial evidence to support them. (*People v. Coleman* (1989) 48 Cal.3d 112, 162; see also *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466; *People v. Green* (1996) 50 Cal.App.4th 1076; *People v. Saffle* (1992) 4 Cal.App.4th 434, 438.) Where the trial court does not make an express finding, as in this case, an implied finding that the crimes were divisible inheres in the judgment and must be upheld if supported by the evidence. (*People v. Nelson* (1989) 211 Cal.App.3d 634, 638.)

In the present matter, there is no dispute that defendant's acts on Curd occurred during a brief period. The issue thus is whether defendant harbored separate criminal intents when he committed the crimes of terrorist threat and assault on Curd. We agree with defendant that the assault on Curd was incidental to the terrorist threat charge on Curd. It is also clear from the record that defendant entertained a single criminal objective, i.e.,

terrorizing Curd, when he pointed the gun at Curd and threatened to kill him. (Cf. *People v. Martinez* (1985) 171 Cal.App.3d 727, 736.) Count 4 should therefore be stayed.

However, we disagree with defendant that count 5 (assault on Campbell) should also have been stayed. When defendant threatened and assaulted Campbell, he entertained separate criminal intents which were independent of and not merely incidental to each other. Defendant first threatened and assaulted Campbell when he went to her apartment, pushed the gun against the screen door, and pointed it at her. Defendant informed Campbell that he was in a gang and pointed at his tattoos. He also told her he was going to kill Curd. At that time, defendant's intent was to threaten Curd and assault Campbell. Later, after defendant was arrested, defendant again threatened Campbell when he told her, "Wait until I get out of jail tonight." At that point in time, defendant's intent and objective was separate and independent from the earlier incident. Accordingly, we agree with the trial court's implied finding that defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other when he committed the crimes of assault and terrorist threat on Campbell.

III

DISPOSITION

The judgment is hereby modified by staying the sentence on count 4 (assault on Curd). The trial court is directed to amend the abstract of judgment so as to reflect the modification and forward a certified copy of the amended judgment to the Department of Corrections (§§ 1213, 1216). In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED

RICHLI
Acting P.J.

We concur:

WARD
J.

GAUT
J.